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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Jacqueline Scott Corley, Judge

ETHAN ZUCKERMAN,)	
)	
Plaintiff,)	
)	
VS.)	NO. 3:24-CV-02596 JSC
)	
META PLATFORMS, INC.,)	
)	
Defendant.)	
_____)	

San Francisco, California
Thursday, November 7, 2024

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff:

KNIGHT FIRST AMENDMENT INSTITUTE
AT COLUMBIA UNIVERSITY
475 Riverside Drive, Suite 302
New York, New York 10115

BY: RAMYA KRISHNAN, ATTORNEY AT LAW
ALEXANDER A. ABDO, ATTORNEY AT LAW
JENNIFER C. JONES, ATTORNEY AT LAW

For Defendant:

GIBSON, DUNN & CRUTCHER LLP
One Embarcadero Center, Suite 2600
San Francisco, California 94111-3715

BY: KRISTIN A. LINSLEY, ATTORNEY AT LAW

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

REPORTED BY: Ana Dub, RMR, RDR, CRR, CCRR, CRG, CCG
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APPEARANCES: (CONTINUED)

For Defendant:

GIBSON, DUNN & CRUTCHER LLP
310 University Avenue
Palo Alto, California 94301-1744

BY: WESLEY SZE, ATTORNEY AT LAW

For Amici Electronic Frontier Foundation and Center for
Democracy & Technology:

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, California 94111

BY: JACOB A. SNOW, ATTORNEY AT LAW

Also Present: **Ariel Ruiz**

Thursday - November 7, 2024

10:18 a.m.

P R O C E E D I N G S

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THE CLERK: Calling Civil Action C 24-2596, Zuckerman vs. Meta Platforms.

MS. KRISHNAN: Good morning, Your Honor. Ramya Krishnan for the plaintiff.

THE COURT: Good morning.
I just need for Meta.

MS. KRISHNAN: With me are my colleagues Alex Abdo and Jennifer Jones, also from the Knight First Amendment Institute at Columbia.

THE COURT: Welcome.

MS. KRISHNAN: Thank you.

THE COURT: Welcome to California.

MS. KRISHNAN: Thank you.

MR. SNOW: I'm just going to appear for *Amici*. Jacob Snow for ACLU of Northern California, the Electronic Frontier Foundation, and the Center for Democracy and Technology.

THE COURT: Good morning.

MR. SNOW: Thank you.

MS. LINSLEY: Good morning, Your Honor. Kristin Linsley for defendant Meta.

THE COURT: Good morning.

MS. LINSLEY: Oh. And with me are Wesley Sze, S-z-e,

1 also from Gibson Dunn, and then Ariel Ruiz from Meta.

2 **THE COURT:** Okay. Ms. Krishnan, so this lawsuit was
3 filed in May; and according to the complaint, the browser
4 extension could be built in six weeks.

5 So is it built?

6 **MS. KRISHNAN:** It isn't yet built. It would take
7 six weeks to complete the tool. This is a significant amount
8 of work for Zuckerman and his engineering team, and there's no
9 reason to put them to this exercise because the Court already
10 has all of the facts it needs to adjudicate the tool's
11 legality.

12 **THE COURT:** So how much would it cost to build it?

13 **MS. KRISHNAN:** I can't put a cost on the team's labor.

14 **THE COURT:** Who would pay for it?

15 **MS. KRISHNAN:** No one's paying for it. Everyone's
16 working on this project *pro bono*.

17 **THE COURT:** *Pro bono*. Okay. So this is not a
18 bet-the-farm case?

19 **MS. KRISHNAN:** Well, it is a bet-the-farm case insofar
20 as releasing the tool would expose Professor Zuckerman to
21 serious legal liability.

22 **THE COURT:** Like what?

23 **MS. KRISHNAN:** So it's important to understand what
24 Professor Zuckerman is up against here. You know, he is a
25 professor at a public university who was only able to bring

1 this case because he was able to connect with *pro bono* counsel.

2 Meanwhile, if he were to release the tool, which is a
3 non-commercial tool -- he doesn't stand to make any money from
4 it. But if he were to release the tool, he would face a risk
5 of suit by one of the richest companies in the world. And
6 defending --

7 **THE COURT:** So he would get a cease and desist letter,
8 and like everything 1.0, he could just cease.

9 **MS. KRISHNAN:** Well, he doesn't -- he doesn't want to
10 have to be in the position that Louis Barclay was in. He knows
11 that most likely, he will --

12 **THE COURT:** Wait a minute. But you said to me he
13 would face these dire legal consequences.

14 **MS. KRISHNAN:** Yes.

15 **THE COURT:** So I'm just spinning that out a bit.

16 **MS. KRISHNAN:** Right.

17 **THE COURT:** So if he got the cease and desist letter,
18 which people get every day, he could cease, and then he
19 wouldn't face those consequences; right?

20 And then he could move for a preliminary injunction if
21 somehow -- I'm not quite sure what it would be -- he had some
22 irreparable harm that he would do that; right? That's normally
23 what we use the preliminary injunction tool for.

24 **MS. KRISHNAN:** Meta would, and has in these kinds of
25 cases against tools where it has pursued legal action, sought

1 damages.

2 In the *BrandTotal* case, for example, it sought \$100,000 in
3 compensatory damages just for investigating BrandTotal's
4 conduct and building a case against it; and then it then sought
5 nearly \$2.8 million in attorney's fees under the California
6 Computer Access -- Data Access and Fraud Act because it
7 prevailed in the suit.

8 And so that is the kind of serious legal liability we're
9 talking about here.

10 And you're right, Your Honor, that he would, if he
11 released a cease -- if he -- sorry -- were to receive a cease
12 and desist letter, would be in the position of having to choose
13 between continuing to engage in potentially unlawful conduct
14 and abandoning his rights, but that's precisely the dilemma he
15 faces --

16 **THE COURT:** Not abandoning.

17 **MS. KRISHNAN:** -- right now.

18 **THE COURT:** At that point, there'd be no question,
19 would there, that there would be jurisdiction to hear the
20 declaratory action? Right?

21 **MS. KRISHNAN:** We think that there's no question that
22 the Court has jurisdiction now. Under controlling
23 Ninth Circuit precedent, all Professor Zuckerman needs to show
24 is that he has a real and reasonable apprehension of being
25 subject to legal liability. And in our view, there's no

1 question that that test is satisfied here.

2 **THE COURT:** What is your best case that I would look
3 at? Because I couldn't find any cases in which -- (a) we're
4 just talking about a breach of contract action -- in which
5 nothing had been built and you'd had no communication with the
6 defendant, both things here. So what is your best case?

7 **MS. KRISHNAN:** Well, we rely on several cases. There
8 are a number of cases where courts have held that where a
9 dispute is over a product's legality, you don't have to
10 complete manufacture before obtaining relief. Meaningful
11 preparation is enough.

12 You see that in the Federal Circuit's decision in
13 *Cat Tech*, which involved a plaintiff who had only created basic
14 designs for their loading device, device configurations and
15 AutoCAD drawings, but they hadn't yet manufactured the tool.
16 And the Court held that there was jurisdiction, even though the
17 product would ultimately need to be customized to the
18 customer's dimensions.

19 You had the *Diamond.net* case where --

20 **THE COURT:** So in *Cat Tech*, there was an infringement
21 claim.

22 **MS. KRISHNAN:** Yes. But we don't --

23 **THE COURT:** So that --

24 **MS. KRISHNAN:** I mean, Meta --

25 **THE COURT:** So my question was where you have no

1 product and no communication with the defendant.

2 Now, if Meta had sued the plaintiff, maybe you'd have a
3 reasonable apprehension there. But we've had no communication;
4 right?

5 There was an infringement claim there.

6 **MS. KRISHNAN:** I mean, the Ninth Circuit has been very
7 clear in cases like *Societe* that the Court should take a
8 flexible approach that is focused on the reasonable perceptions
9 of the plaintiff, not the subjective intentions of the
10 defendant.

11 And here, where Meta has been clear that the tool is
12 unlawful, not only in its cease and desist letter to Louis
13 Barclay, which concerned a nearly identical tool, but in this
14 very lawsuit it has asserted --

15 **THE COURT:** I don't know if the tool is identical
16 because it hasn't been built.

17 **MS. KRISHNAN:** Well, our amended complaint explains at
18 length why these tools would work in essentially the same way.

19 And this tool has been taken to the precipice of
20 completion. Professor Zuckerman has developed a detailed
21 blueprint in the form of pseudocode. An academic cybersecurity
22 expert has vetted the design for the tool and confirmed that if
23 built to those specifications, it will perform as expected.

24 **THE COURT:** If built.

25 **MS. KRISHNAN:** Yes. And he's ready and able and

1 willing to complete the tool, and that -- we do submit that
2 that is sufficient.

3 And there are a number of cases. Yes, they're from the
4 patent context for the most part, although you also have the
5 *3Taps* case, which was not a patent case and, instead, involved
6 a plaintiff who wanted to engage in scraping that LinkedIn
7 alleged was a violation of the CFAA, and it applied the
8 meaningful preparation test.

9 But there is no separate justiciability test for patent
10 cases versus non-patent cases. *MedImmune* is very clear on
11 this. The question in each case is whether the facts alleged,
12 under all the circumstances, show a substantial controversy of
13 sufficient immediacy and reality. And there's no question that
14 meaningful preparation of the kind that Professor Zuckerman has
15 engaged in here is obviously relevant to that inquiry, whether
16 or not infringement is the issue.

17 **THE COURT:** So in a lot of the other cases -- for
18 example, I think in *Interdynamics*, they had already placed
19 orders in the next few weeks. A patent case. They were about
20 to go out of business.

21 I mean, here, now you tell me it's not even -- it's
22 *pro bono*. Why not build it so I'm adjudicating actually a
23 concrete program that actually does something?

24 You see, here's my concern. It's that I say something,
25 and then, "Oh, okay. Well, I'll modify if I do it this way."

1 I mean, it seems to me it's just a classic advisory opinion.
2 This seems to be way on the edge. That's why I asked you about
3 a case in which nothing has been built and no communication
4 with the defendant; right? All that goes to reasonable
5 apprehension. I don't know how you get there.

6 What Meta says is: I don't know. I don't know. I don't
7 know what it does. I don't know what it looks like.

8 You've shared nothing with them. You've communicated
9 nothing. It sounds, actually, like a good idea. Meta, maybe
10 they'll let it go. They didn't with the other. I don't know.
11 I mean, it's so hypothetical. It's so "if."

12 **MS. KRISHNAN:** I mean, the whole point of the
13 Declaratory Judgment Act is to give potential defendants relief
14 from the Damoclean threat of liability. So the Ninth Circuit
15 has made clear, you don't have to wait for an explicit threat
16 of suit. You don't need to wait to be sued. All you need is a
17 reasonable apprehension.

18 And here, there's no question that Professor Zuckerman is
19 able to build the tool as described. He has extensive
20 experience building similar tools, including considerably more
21 complex tools. We've alleged that --

22 **THE COURT:** Then why doesn't he build it?

23 **MS. KRISHNAN:** -- in the complaint.

24 Because it is a significant -- I mean, yes, he is a
25 professor at a research university; and, yes, he can get people

1 to volunteer to work with him on this project; but their
2 time -- I mean, they engage in important research. There is an
3 opportunity cost to building a tool that may prove to be
4 illegal versus, you know, being able to spend time on those
5 other worthy projects and waiting till he gets an assurance
6 from this Court that, in fact, he would not be engaging in
7 unlawful behavior were he to build the tool and release it to
8 the public.

9 **THE COURT:** So why even do the pseudocode? Why not
10 just file a lawsuit and say: "Judge, if I were to build
11 something that could do this, would it violate the terms of
12 use? Because I'm a busy professor, I have other things to do,
13 and I don't want to spend the time doing the pseudocode
14 either"? Why do you draw the line there?

15 **MS. KRISHNAN:** Well, I'm not drawing the line there.
16 I think the Courts have drawn the line by requiring meaningful
17 preparation; that is, significant concrete steps. That's the
18 language that's used in a number of these cases.

19 And that's why he's taken significant concrete steps.
20 The detailed blueprint in the form of pseudocode that
21 addresses -- that's an immediate precursor to coding that
22 addresses key questions of function and architecture sufficient
23 for an academic cybersecurity expert to say: If you build
24 this, it will perform as you say it will and it will protect
25 user privacy.

1 **THE COURT:** What expert? Who is this expert?

2 **MS. KRISHNAN:** We haven't identified them by name, but
3 it is an academic cybersecurity expert at the university.

4 **THE COURT:** Therefore, it can be built?

5 **MS. KRISHNAN:** Yes. I mean, pseudocode is a -- it is
6 a normal step taken by software designers in the course of
7 designing software; and it is, as I said, an immediate
8 precursor to coding.

9 But, you know, Professor Zuckerman has taken those
10 significant concrete steps to show that he is eager and willing
11 to pursue this project, but he already faces the kind of
12 dilemma that *MedImmune* says it is the point of the Declaratory
13 Judgment Act to address.

14 I would just add that, you know, on Meta's theory, we
15 would be in no better position if Zuckerman had already coded
16 the tool because they say: Well, you have to release the tool;
17 we have to check that it works as you say it does; and then we
18 have to decide, you know, what step we want to take.

19 But the Declaratory Judgment Act does not require a
20 certainty of suit before the plaintiff is able to seek relief.

21 **THE COURT:** What case has where the defendant has no
22 idea, has never even seen what it is? You're not sharing the
23 pseudocode, nothing. You've had no communications with the
24 defendant. What case says that?

25 And this is constitutional. This is an important question

1 because, should I agree with you and go forward, the whole
2 thing could be voided -- voided -- if I was wrong. So this is
3 a critical, critical question where, by the way, the burden is
4 on you to prove jurisdiction. And any doubts -- right? -- no
5 jurisdiction.

6 So what case says defendant's never seen this hypothetical
7 program, hasn't seen the pseudocode, hasn't had any
8 conversations, but yet you can hold, for Article III purposes,
9 that there is a controversy? What case would I look at?

10 **MS. KRISHNAN:** Well, you know, cases like *Cat Tech*,
11 *Diamond.net*, *Interdynamics*, these are all cases where the
12 product was not manufactured yet and so the defendant had not
13 yet been --

14 **THE COURT:** But *Cat Tech*, they sued for infringement.
15 So clearly, under Rule 11, they had to have a good faith basis
16 for believing it infringed. So they were aware of enough
17 information that they had that good faith basis.

18 So I'll ask -- just say -- if there isn't one, just say:
19 No, Judge, actually, we think you should do this, but there
20 isn't a case that does that.

21 Is there a case in which the defendant has not been
22 shown -- has had no communications with the plaintiff, hasn't
23 seen anything and, yet, the Court held that there was
24 Article III ripeness?

25 **MS. KRISHNAN:** I can't think of a non-infringement

1 case.

2 But if I could just note that the cease and desist letter
3 that Meta sent Louis Barclay, it conspicuously did not object
4 to any aspect of the tool's code. What it objected to was what
5 it called the tool's unauthorized functionality, which it
6 identified as automating, quote, mass following and
7 unfollowing. And that is precisely the same functionality that
8 Zuckerman's tool would have.

9 And we have alleged in the amended complaint that,
10 you know, the tools work in essentially the same way.

11 But really, Meta's objection is at the level of the
12 functionality of the tool, the very fact that it automates any
13 action on Facebook. And Your Honor knows that Zuckerman's tool
14 will do the same because we have alleged that in this
15 complaint.

16 **THE COURT:** Okay.

17 **MS. LINSLEY:** Good morning, Your Honor.

18 Just to answer Your Honor's question to my opposing
19 counsel, there is no case that we know of where a plaintiff was
20 able to come in and invoke federal jurisdiction under the
21 Declaratory Judgment Act to get an advance ruling of immunity
22 from any possible suit from a third-party app or other device
23 of any kind that we know of that did not yet exist at the time
24 of the lawsuit that would have rendered -- even if successful,
25 yielded an advisory opinion of a ruling that, depending on how

1 the facts actually played out, would probably be of no worth
2 whatsoever.

3 It's particularly problematic here, Your Honor, where the
4 plaintiff is seeking immunity, essentially, literally and
5 figuratively, from a subsequent lawsuit by Meta when Meta has
6 an obligation, as this Court -- as courts in this district have
7 recognized, to police third-party apps that access Facebook's
8 system, and to do so in real time, so that it can determine
9 whether its terms that are meant to protect not only -- meant
10 to protect user privacy, user security, and the integrity of
11 Meta's own systems are being -- whether they are being violated
12 or not.

13 Meta has to do that in real time and will have to do that.
14 Even if this case were to go to judgment, it would still have
15 to evaluate the app, once it comes out, to see not just how --
16 what the end result is. That's not all it would have to do.
17 It would have to examine the functionality to see if the app
18 performs as represented, in which case it probably would
19 violate Meta's terms, but also to see if there are other
20 problems with it that are not as represented, such as whether
21 the app would communicate data outside the Facebook system and
22 beyond the user.

23 The plaintiff alleges in the complaint, "Oh, all the data
24 will stay on the user's hard drive," but then he says that the
25 app is still going to communicate back to his server for

1 purposes of updates and possibly otherwise. So how do we know
2 until it's tested? There's no way for Meta to know whether
3 data is being taken from the Facebook users and used somewhere
4 else and transmitted somewhere else.

5 There's also no way of knowing what promises will be made
6 to consumers and users about how the app will function
7 vis-à-vis their data. And as courts have recognized in this
8 district, especially since *Cambridge Analytica*, that's
9 something that we need to be very mindful of.

10 And Judge Hamilton noted this in the *Stackla* case, and so
11 did Magistrate Judge Spero in the *BrandTotal* case, that it's
12 essential and, actually, a matter of important public policy
13 that Meta do that.

14 It can't do it in the abstract in advance based on
15 hypothetical facts. It has to do it based on real facts and
16 how the app would actually function, running diagnostic tests
17 to see what data is being transmitted or not and making sure
18 that people's security is being safeguarded, including that
19 they're not being subjected to misleading claims about how the
20 app will handle their data. So that is something Meta would
21 do.

22 So for this Court now to enter the decree that plaintiff
23 is asking for, which is quite remarkable in how he phrases
24 it -- he wants the Court to say, without any facts at all built
25 into the statement, that his app does not violate Meta's terms,

1 or Meta's terms are void for public policy, which I can get to
2 separately.

3 The tool does not violate CAFA, the federal statute
4 prohibiting unauthorized access or access that goes beyond what
5 authorization was given. So here, we literally don't know what
6 that would look like factually. The tool does not violate
7 CDAFA either.

8 I mean, the Court, obviously, can't enter those rulings,
9 which is what he's seeking in his demand.

10 So necessarily, if the Court were to do this, it would
11 have to build in all these hypothetical facts, like if the app
12 does -- only if the app, you know, only automates the user's
13 request for lists of his or her friends, groups, and pages; and
14 if it automates unfollow and maybe automates follow if the user
15 decides to do that later; and it doesn't do these other things.
16 It doesn't transfer data to someone else. It doesn't
17 overburden Meta's system with hundreds or thousands of people
18 doing mass unfollow requests at the same time, because that's
19 also one of the terms of Meta's engagement with users. And
20 then another term is that it won't change the way Meta's
21 presentation or system appears or operates. So you'd have to
22 build in all of those things; it wouldn't do any of these
23 things.

24 And then, also, the proposed decree doesn't even cover the
25 stuff that's in the cease and desist letter to the other

1 developer. It doesn't cover intellectual property violations
2 because we just don't know. And the CAFA/CDAFA stuff wasn't in
3 the cease and desist letter.

4 A lot of the enforcement action plaintiff relies on that
5 Meta did bring against third-party apps involve other causes of
6 action too, like interference and other types of torts that may
7 be applicable, depending on the facts. And the existence of
8 those cases, far from being a reasonable threat to this
9 plaintiff, prove up our point, which is, these enforcement
10 actions are done on the basis of a real app that's actually
11 issued that can then be the subject of testing and analysis,
12 that the facts can then be presented to the Court.

13 Like in Judge Chen's anti-scraping cases, okay, we knew
14 exactly what was going on. It was logged-off activity. It
15 wasn't logged on.

16 Here, we have logged-on activity. The app would actually
17 enter Facebook through a user's logged-on status and be able to
18 act just like the user in that context, at least according to
19 the complaint.

20 Other cases involved -- like, you know, *BrandTotal*,
21 the Court had the app operating, knew exactly how it operated
22 and was able to rule.

23 So, you know, there's just no justiciable dispute here.

24 I do want to make one point about the legal precedence
25 we're talking about. It is not just a reasonable apprehension

1 of a suit that is the Article III test. That is not what
2 *MedImmune* said. That's part of the test. But what *MedImmune*
3 said is you need to have a concrete set of facts that would
4 give rise to a decree that can be enforced between the parties
5 that would not be based on a hypothetical set of facts. You
6 need to have concrete facts.

7 In *MedImmune* itself, you had a license agreement, and
8 there was a patent supporting the license agreement, the
9 application for which was pending. The Court said -- and so
10 the patent -- the licensee wanted a declaration that the patent
11 was invalid because (a) he didn't think he should have to pay
12 royalties under an invalid patent; and (b) there were issues --
13 there were other issues about infringement that he didn't want
14 to incur.

15 So for both of those reasons, it was a concrete dispute
16 that was an actual patent that could be adjudicated, and there
17 was actual activity that he was carrying out under the existing
18 license agreement that would be the basis of a determination by
19 the Court, once it took the case up, as to whether there was
20 infringement or whether -- whether the patent -- whether his
21 activity would infringe the patent. You needed that factual
22 basis. That was there in that case.

23 Likewise, in *Societe*, which is kind of the keystone case
24 for this kind of reasonable-apprehension-of-suit test -- and
25 that was a case from 1982. It predates *MedImmune*, but the

1 courts are still following it in this circuit -- the Court made
2 clear at page 944 of the opinion the same thing, that there
3 were concrete facts.

4 In *Societe*, it was an aluminum -- two manufacturers of
5 aluminum rolling equipment, both of which were trying to get
6 contracts with Reynolds, Reynolds Wrap, and both of them were
7 already carrying out their practices. There was an existing
8 patent that was alleged to have been violated, and there was
9 existing infringing activity already happening.

10 The Court says at 944 (as read):

11 "In a case like the one before us, in which the
12 plaintiff is engaged in," quote, "the ongoing
13 manufacture of the alleged patented item, the showing
14 of real and substantial apprehension beyond the
15 manufacture of the patented item need not be
16 substantial."

17 Because in that case, the Court again said it's an actual
18 manufacturer of a product that may infringe the patent owned by
19 another, in which case the adverse legal interests of the
20 parties are crystallized, thereby obviating the concern that
21 there be an advisory opinion based on a hypothetical set of
22 facts.

23 And, likewise, with the other infringement cases, there's
24 concrete matter that the Court can actually adjudicate,
25 including the existence of a patent and whether the plaintiff's

1 activities constitute infringement. So those concrete points
2 always have to be there, and then you still need to have a
3 reasonable anticipation that someone is going to sue you.

4 And I think Your Honor has covered that last point.
5 There's been no communication whatsoever between Meta and this
6 plaintiff. The fact that he has a cease and desist letter
7 going to someone else, we don't even know how that someone
8 else's app -- it's not laid out in the claim -- how that
9 operated. But we certainly don't know how his will operate.
10 So we can't take on faith that it would be just like the other
11 one.

12 It doesn't -- and, likewise, would the enforcement actions
13 the courts -- court after court, in the declaratory judgment
14 context, have made clear that just because you sue someone else
15 doesn't mean that's a reasonable apprehension for a different
16 plaintiff who is now coming in and saying, you know, "I might
17 be sued."

18 So I think if Your Honor has questions about
19 justiciability, that's sort of where we are. I can also
20 address the merits.

21 **THE COURT:** I don't think we need to go to the merits.

22 I mean, what about that is, like, there may be all sorts
23 of ways it violates the terms of use. Some, there may be good
24 affirmative defenses to; some not. But until the app is built
25 and launched, anything I would say would just be advisory.

1 **MS. KRISHNAN:** I mean, I think it's -- I think it's --
2 it's conspicuous that Meta -- Meta essentially concedes that it
3 would not be enough to code the tool; that it would require
4 Professor Zuckerman to actually release the tool before he
5 could come into court. But that is precisely what *MedImmune*
6 says that declaratory plaintiffs don't need to do, which is to
7 run the gauntlet and run the risk of legal liability. And
8 it --

9 **THE COURT:** *MedImmune* was a patent case.

10 **MS. KRISHNAN:** It was a patent case, but I don't think
11 that -- the courts --

12 **THE COURT:** Well, then stop.

13 And it was about patent invalidity; right? Am I right?

14 **MS. KRISHNAN:** It involved -- it was about patent
15 invalidity. There was also a breach of contract claim in the
16 sense of there was a question of whether the license agreement
17 had been violated.

18 **THE COURT:** But if the patent was invalid, then
19 that -- that was the question, was the patent invalidity. And
20 patent invalidity is really a question of law, in large part,
21 based on, you have the patent and invalidity. So, it's
22 concrete.

23 But this is a completely different context. This is just
24 a completely different context.

25 In any event, this is -- this would be new law. This

1 would be new law in terms of ripeness and Article III out
2 there. This would be -- this is way, way, way on the edge.
3 And to say, well, you know -- this would be: I want to build a
4 product and I have all my design, but I need some investors.

5 But the investors say, "I'm a little concerned about this
6 patent out there, so I don't want to give any money until I
7 know if it's going to be good, if it will get past this." So I
8 file a dec relief action.

9 And the Court will say, "If it's built, as this looks" --
10 nothing's been built. I have no prototype or anything. But
11 "If it's built along with these things, no, it wouldn't
12 infringe for this reason."

13 So they build something else.

14 I mean, we would have nothing else to do but give advisory
15 opinions because everyone would want them because they could be
16 so helpful for investing. I understand. But that's not what
17 the Constitution requires.

18 And here is really no different. Here, it's the
19 investment of six weeks of engineering time. That's really
20 what you're talking about. I don't find persuasive the legal
21 consequences because there, you put it up, you cease and
22 desist, you stop, or you get your preliminary injunction.

23 **MS. KRISHNAN:** I mean, there's no guarantee here that
24 Meta would send a cease and desist. I mean, it hasn't
25 disclaimed an intent to sue immediately. And if it were to sue

1 immediately, they could seek damages, very significant damages,
2 and they could also seek attorney's fees, as they did in the
3 *BrandTotal* case when they prevailed. And that is the kind of
4 serious legal liability that *MedImmune* says the courts --

5 **THE COURT:** That's not enough.

6 **MS. KRISHNAN:** -- care about.

7 **THE COURT:** But that's not enough. In *MedImmune*, it
8 was concrete.

9 It's just not concrete. I don't know that those people
10 can actually code it that way. I don't know how it's going to
11 work. If it was automatic, we wouldn't need the coders. You
12 could just push a button and there, the code would appear;
13 right? They actually have to do something. And maybe it can
14 be done and maybe it can't be done, and maybe it'll work and
15 maybe it won't work. But --

16 **MS. KRISHNAN:** If I could draw Your Honor's attention
17 to one more case, which is the *Paramount Pictures vs. Axanar*
18 case, where there was a shooting script, yes, but only one
19 scene had been filmed. And yet -- I mean, I hear what
20 Your Honor is saying about cases involving the question of
21 patent validity; but many of these cases, such as the *Axanar*
22 case, also involved a claim of infringement, which meant that
23 the Court had to compare the unfinished product with the
24 defendant's patent and ask whether there was substantial
25 similarity.

1 And we think that that's sort of analogous to what's at
2 stake in this case.

3 **THE COURT:** The *Paramount* -- the Court explained that
4 because it wasn't -- first of all, there was a
5 locked-and-loaded script which apparently the defendant had
6 seen; right? So you actually had communication between the
7 plaintiff and the defendant, which we don't have here.

8 **MS. KRISHNAN:** There was no communication between the
9 plaintiff and defendant in the *Societe* case. What --

10 **THE COURT:** I'm addressing *Paramount* --

11 **MS. KRISHNAN:** Right.

12 **THE COURT:** -- which you said you wanted to bring up
13 one more case, so I'm addressing that case.

14 And the judge explained that the substantial similarity
15 was based on a long franchise of films, and it was more about
16 whether the character, that whole -- would be the similarity.
17 So it didn't matter that the whole film hadn't been completed
18 that he thought he could do the substantial similarity
19 analysis.

20 What I'm telling you is, I haven't been persuaded that I
21 can do the analysis, which is not substantial similarity, which
22 is whether this browser extension, which has not been built nor
23 uploaded, violates Meta's terms of use. I can't do it. I
24 can't do it in a concrete way that would not be advisory. So I
25 don't think there's Article III subject-matter jurisdiction.

1 And second, declaratory relief is discretionary, and I
2 wouldn't do it anyway. I think it would be bad judicial policy
3 to create this new law -- and I think you're asking for new
4 law -- that it would open up the courts to doing advisory
5 opinions because people don't want to invest time or money. I
6 just don't think that's a good use of declaratory judgment.
7 It's just not concrete.

8 When it is concrete, I'm happy to do it. It's a very
9 interesting case. It's a very interesting case. But I think
10 it needs to be built so I actually have something in front of
11 me, like I do when I have a patent; right?

12 When I have a patent, there's something in front of me.
13 There's prior art. There's all the representations that were
14 made to the PTO. That's what's being adjudicated.

15 Here, as counsel said, it would be if the browser
16 extension does this, if it does this, if it does this. That's
17 just classic advisory opinion.

18 So I'm going to grant the motion to dismiss without
19 prejudice, of course, and I'll issue a written order.

20 Thank you for your excellent argument, both of you.

21 **MS. KRISHNAN:** Thank you.

22 **MS. LINSLEY:** Thank you, Your Honor.

23 (Proceedings adjourned at 10:51 a.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Friday, November 29, 2024

Ana Dub

Ana Dub, RDR, RMR, CRR, CCRR, CRG, CCG

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